EXHIBIT 9

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROSETON OL, LLC and DANSKAMMER OL, LLC,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 6689-VCP
DYNEGY HOLDINGS, INC.,	:	
Defendant.	:	

- - -

Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, July 25, 2011
4:05 p.m.

- - -

BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor.

- - -

ORAL ARGUMENT
MOTION FOR TEMPORARY RESTRAINING ORDER

APPEARANCES:

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JEREMY ANDERSON, ESQ.
Connolly, Bove, Lodge & Hutz LLP
-and-
FILIBERTO AGUSTI, ESQ.
JOHN F. O'CONNOR, ESQ.
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Steptoe & Johnson LLP
for Plaintiffs

SAMUEL A. NOLEN, ESQ.
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-and-
GLENN M. KURTZ, ESQ.
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for Defendants

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THE COURT: All right. Good afternoon.

MR. AGUSTI: Good afternoon, Your Honor.

MR. NOLAN: If I could just begin with introductions of counsel who are at the table with me; Glenn Kurtz, Thomas Lauria and Doug Baumstein from White & Case. With Your Honor's permission, Mr. Kurtz will make today's argument.

THE COURT: All right. Okay. Mr. Brady, before we get started?

MR. BRADY: Good afternoon, Your Honor. Kevin Brady from Connolly, Bove, Lodge & Hutz for Roseton OL, LLC and Danskammer OL, LLC. With me at counsel table is Mr. Filiberto Agusti and Mr. John O'Connor from the Steptoe firm and, at the end, my colleague Jeremy Anderson. Mr. Agusti and Mr. O'Connor have been admitted pro hac; and with Court's permission, Mr. Agusti will make the argument for the plaintiffs.

THE COURT: Okay.

MR. AGUSTI: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. AGUSTI: There's been a lot of paper generated in a very few days in this case and I apologize. We are partially responsible for some of that. But one thing that I want to be sure I started off with is by making sure that with all this paper, we don't lose the forest for the trees.

In essence, what we're bringing before Your Honor is a motion for a temporary restraining order in a situation where as a result of some transactions that Dynegy Holdings, Inc. proposes to do, they are going to essentially eviscerate $1 billion of guaranties that our clients hold.

We believe that these transfers will both violate the terms of the guaranties and also violate -- even if it didn't violate the terms of the guaranties, violate the Delaware Fraudulent Transfer Act.

Your Honor, I'll just begin with a -- and the reason why we need a temporary restraining order, Your Honor, is because that will cause immediate and irreparable harm to my clients. And as I'll point out, there is really no balancing harm to the defendant for the short period of time that it will take for the Court to allow the parties to brief

and to hear preliminary injunction --

THE COURT: They say it jeopardizes their financing.

MR. AGUSTI: Your Honor, actually, what they say is that the entire proceeding jeopardizes their financing. But if you look carefully through all the paper that's been filed, there is actually no allegation that a temporary restraining order for this short a period of time would actually eliminate their possibility for financing.

Essentially, remember what we're asking for at the TRO stage instead of a preliminary injunction. What we're asking for here is a temporary restraining order to give us sufficient time to brief and have a hearing on the merits of our preliminary injunction hearing.

Your Honor, I'll get to some of the things they say about what might happen to them. I might also add that their allegation about harm to financing is not supported by any -- and there's been a lot of paper here, but there's absolutely no specific allegations as to what specifically is going to happen in this short period of time that's going to

make the financing go away. There is really nothing alleged in documents that say that the financing is not going to be possible if they should prevail at a preliminary injunction hearing.

So, Your Honor, what I would say to the harm that they're caused is that there is a general statement that there's a possibility of harm to them, Your Honor, but actually there are no facts that are actually narrowly alleged as to what will happen to them, and there is certainly not even an allegation that they have to file for bankruptcy if Your Honor takes the short period of time required for preliminary injunction, or that they'll lose their financing.

What they're saying right now to the Court is that perhaps at a preliminary injunction stage, if a preliminary injunction were entered, they might not be able to do those things, but I'll get to that in a moment.

THE COURT: All right.

MR. AGUSTI: Your Honor, just to go through the facts -- and Your Honor has probably read the briefs.

THE COURT: I have read the briefs.

MR. AGUSTI: Terrific. Then I will just point out what I think are the forest; but if Your Honor has any other questions, I'm here actually to answer Your Honor's questions, not to go on incessantly.

Your Honor, as Your Honor knows, our clients entered into a sale/leaseback transaction for close to a billion dollars in 2001. Essentially, the sale/leaseback documents amply give my clients access to those assets, which are essentially the Danskammer Plant Units 3 and 4 and the Roseton facility; and so, Your Honor, we don't need any further access to those assets.

What the guaranty was clearly calculated to do was to get DHI on the hook for this as well because our clients did not simply want to rely on the credit of these two facilities. And in connection with that, we had anti-transfer provisions that, as both parties have noted, basically call for bid a transfer of the assets sold as an entirety to any person in one or more transactions.

And it is notable, Your Honor, that that is talking about all the assets of the guarantor. It doesn't say just the equipment. It doesn't say

just the coal plants. It doesn't say the coal plants but not the stock. It says "all assets." Stock is just one more category of assets.

And so when our clients were looking for a guaranty, they were looking for everything that DHI held. And, indeed, DHI now, Your Honor, has asserted in its papers that we knew that they held everything indirectly through stock, and so almost necessarily, the assets must have included stock.

It's also relevant to note, Your Honor, that it doesn't say "only assets held directly by DHI." It just says "assets," "all assets," not "just assets held directly by DHI." And, indeed, if any such express provision would have been suggested, our clients would have presumably fought it because, as they say, all of our assets, all of the assets of the guarantor, were held indirectly.

So, Your Honor, which brings me actually to the discussion of the first sort of factual position that they've taken in their opposition, which is that, essentially, although PSEG, these two indirect subsidiaries of PSEG, knew that the assets were held indirectly, they agreed to a billion-dollar guarantee that did not cover them.

That, Your Honor, is inconceivable. You would not get a guaranty -- the only purpose of the guaranty was to get collateral out -- or to get, I should say, credit support outside of the two facilities that were being leased.

And PSEG would not have agreed to have an anti-transfer provision that basically allowed them, the day after that guaranty was signed, to transfer everything out from under the guaranty. That's not -- it's -- to us, it's an implausible interpretation of the statute; and under New York law, it would be a very disfavored interpretation of the statute.

And, indeed, Your Honor, we're faulted in their briefs for not including 37 different kinds of preventative provisions that we could have this thought of. But, Your Honor, I would turn the question back to them. If they intended for us to agree to their not -- to basically be able to transfer -- for the indirect subsidiaries to be able to transfer whatever they wanted, those assets that basically were owned indirectly by DHI, why didn't they include such provision in the anti-transfer provisions? The fact is, Your Honor, that it's not

there.

And so, Your's Honor --

THE COURT: You mentioned a moment ago that something was not authorized by the Act or some reference to the Act. What Act are you referring to?

THE WITNESS: The Fraudulent Transfer Act, Your Honor.

THE COURT: All right.

MR. AGUSTI: And so, basically -- and actually, wholly aside from this conversation that we're having about the guaranty provision, the Fraudulent Transfer Act, we believe, would prevent this from happening because, clearly, we believe that --

THE COURT: That's sort of an independent argument from --

MR. AGUSTI: Independent. Actually, right now, I'm just setting out, walking through the facts as I see them, because at this TRO stage, we have conducted no discovery, of course, so we have to try to respond to factual allegations as they are flung at us.

Let me just proceed, if I may, then to where we are today. Essentially, we believe that we

have a guaranty that should be backed by all of the assets of DHI. What's happened, of course, is that the Roseton and Danskammer plants are not doing so well. They have basically insufficient revenue to service the leases, which are basically the payments that they owe to our clients.

For example, although outside of the lease payments, Roseton is scheduled to clear about $1 million, it has a $78 million lease payment due on November 11th -- or November of 2011. And so, Your Honor, it's perfectly clear now that Roseton can't meet its service.

And it's perfectly clear, I might say, from Dynegy's own 8-K that this new company that they're basically creating by stripping all of the valuable assets away from DHI is going to have a negative cash flow in the hundreds of millions of dollars.

They say that they intend to have the affiliates make contributions in the future, but the fact is, Your Honor, there is absolutely no obligation for any affiliate to make any contribution to DHI in the future, at least on the basis of the documents that have been presented to us so far.

And so, Your Honor, at the point in time when the guaranties have become most important and most relevant to us, at that point in time, we have this so-called corporate reorganization. And what the corporate reorganization, Your Honor, basically amounts to is a transfer of every asset, really, that they have in the company, every piece of stock, everything that they have with the notable exceptions of Roseton and Danskammer, essentially, into bankruptcy-remote entities.

And there's been a lot of discussion about what bankruptcy-remote entities mean; and what it means has varied. What Dynegy says it means has varied in the last several days.

I don't know if Your Honor had an opportunity to see our reply brief.

THE COURT: I did.

MR. AGUSTI: But, you know, quite recently, Dynegy took the position in open court that, actually, an independent director did have the power to be able to prevent distributions up to the parent. So that was Thursday. Apparently, in reaction to our suit, there's now been a -- well, at least the LLC documents that we see now say that the independent

director is no longer required in order to have a distribution.

But it -- a couple of things to bear in mind is that there can be no distributions -- that the board is supposed to only be thinking about the interests of the bankruptcy-remote entity. That is to say that this isn't going to be like every other DHI wholly owned subsidiary.

DHI wholly owned subsidiaries, as the Court knows, basically can be run for the interests of its shareholder. This entity is going to have an independent board that is going to make independent decisions. And those independent decisions are surely not going to include the payment of our $790 million that is still outstanding to PSEG.

THE COURT: So you're referring to the fact that DHI is designated as a restricted affiliate; is that right?

MR. AGUSTI: I'm sorry?

THE COURT: Does this work into this language about a restricted affiliate?

MR. AGUSTI: Yes. It's referred to as a restricted affiliate by -- in its own papers. And so, basically, it's an affiliate, but it's not like

every other affiliate. It's an affiliate that has special qualities. It is run independently, and it is supposed to be run on its own for its own behalf.

And as we pointed out in the reply, Your Honor, distributions can't be made if they are in violation of the credit agreements, according to this new LLC document that we saw at 10:00 a.m. this morning.

Now, we don't have a copy of the credit agreements so we don't know what the credit agreements provide, but there is, it would seem to us, a strong likelihood that the creditors of this new bankruptcy-remote entity are going to have some say as to whether money from their borrower gets dividended up to pay an overdue debt of a creditor of DHI.

So, Your Honor, there are many ways -- and I think a lot of what I keep talking about with trees and forests, there are a lot of little points that have been made throughout the opposition which make you think that, you know, nothing has changed; but, Your Honor, surely and absolutely, something is going to change. Because if nothing was going to change to us, Your Honor, they would not be here resisting us so much.

And what's going to change, surely as it can be, the whole reason for a bankruptcy-remote entity, is in order to create a ring-fence around these assets, in their own language, a ring-fence around these assets that are being transferred over to these new subs. And we, PSEG's subsidiaries, are decidedly outside the ring-fence.

That is the substantive qualitative difference of what's going on here. It is, for us, it is something that's irremediable. Basically, at the end of the day, when they transfer those assets over, they will find -- what they hope to do is to keep us outside of the ring-fence and, therefore, no longer have access to the stock.

THE COURT: So what would happen if this all went through as you envision it, by the end of this year, they, DHI, would have defaulted on the two -- or its subsidiaries for those two plants, they would have defaulted on the monies that they owed. You'd make demand of DHI for payment under the guaranties. DHI wouldn't do it. You'd get a judgment against them. And then, as they say, you'd have control of their stock. That's their main entity. But you wouldn't be able to use that control of the

stock to cause the coal company and the gas company to make dividends and so on to you because you have run up against this bankruptcy-remote structure.

MR. AGUSTI: That's absolutely right, Your Honor. That makes this kind of a transfer -- that's the whole reason why they're doing it. That's the whole reason why we're here.

THE COURT: Now, let's suppose we're in the pre-transaction world. Let's assume they're already in default; that you've already gone through the stages of making a demand against the guaranty. They don't perform on the guaranty. You get the judgment against them. You get the stock as it sits today.

MR. AGUSTI: Yes, sir.

THE COURT: Do they have a controlling interest in these -- I mean in the individual --

MR. AGUSTI: Absolutely, Your Honor.

THE COURT: -- plants and so on?

I realize it might be ten layers of subsidiaries, but somewhere down there is a plant.

MR. AGUSTI: Absolutely. As far as we know, Your Honor, they have a 100 percent interest all the way down.

And so, basically, if a stock is as it sits today, once we execute that judgment, what would happen is we would have the power to go all the way down to the bottom and do what any 100 percent shareholder of a corporation could do. It could liquidate assets. It could allow the assets to run and use -- and dividend up the cash flow. It could do all of those things that anybody who is a holder of stock of an unrestricted affiliate, if you will, can do. And what's --

THE COURT: All right. Let's assume, then, that there's no injunctive relief. The transaction goes through the way they're talking about. And then we get down the road. All these defaults have occurred. You've tried to exercise all your rights under a judgment against DHI, but you get nowhere.

And so as part of your enforcement strategy, you're pursuing this case not in an injunctive mode, but to have a final judgment on the merits that this was -- this transaction was fraudulent or some sort of thing like that.

MR. AGUSTI: Mm-hmm.

THE COURT: Then why isn't it

sufficient to just wait until that occurs and get whatever remedy comes out of that?

MR. AGUSTI: There are a couple of reasons, Your Honor.

The first reason, of course, is that our contract claim would be largely frustrated at that point. We don't have an agreement with those newly created bankruptcy-remote entities.

And so, basically, to the extent that -- so the breach of contract claim that we believe we have, because there would have been a breach of Section 4.2 of the guaranty, that claim would be, as a practical matter, gone, because we would no longer -- because the entity against which we could enforce our rights would at that point be completely insolvent. Hundreds of millions of dollars in negative cash flow. So that cause of action would go away.

As to the fraudulent transfer action, Your Honor, what we would try to do is we would seek to essentially transfer -- to pull back, to void the transaction, and pull the asset back into DHI.

But if this were allowed to go forward, Your Honor, we would face some complicating

factors. At that point, presumably, if this transaction were to go through, the third-party lenders to the bankruptcy-remote entity would take the position, I suppose, that they had detrimentally relied upon the fact that this entity had the asset at the time. And we would then be faced with a bunch of complicating third-party claims on our fraudulent transfer action that would make it more difficult than it would be if we didn't have those transactions before.

So that's, Your Honor, the reason why for us, largely, what is now a very straightforward $790 million claim, because there would have been a breach of the guaranty -- and at that point, to be sure, the current senior creditors may well be senior to us, Your Honor, but there is excess value in there that's being transferred over to these other entities; and we would like to have a shot at that excess value.

We would not like for that excess value to essentially be encumbered or be in contest with other people for it. What we would like to do, Your Honor, is to have an active, effective, fraudulent transfer action that prevents our cause of action from being frustrated.

THE COURT: But for fraudulent transfer, you'd have to show that conveyances were made for virtually no consideration; that there was nothing in it for DHI and so on.

MR. AGUSTI: Yes, sir. Yes, sir. And we're prepared to do that.

Your Honor, there's actually two ways of having a fraudulent transfer. First of all, as we stated in our papers, you have to show reasonably equivalent value -- irrespective of intent, you have to show reasonably equivalent value. And the reasonably equivalent value in this case would be -- there is no reasonable equivalent value. They essentially concede, Your Honor -- let me back up.

Reasonably equivalent value is to be viewed from the perspective of the creditor. We've cited case law for that proposition. And that's understandable, Your Honor, because the fraudulent transfer statute is to protect the creditor. So what the value that's going back to DHI would have to be would be value that is valuable to the creditor, us.

Now, what value is going -- there is an excess of value going to the bankruptcy-remote entities. There is a payment being made to secured

lenders, Your Honor, with that. And that part of the transaction, we don't want to focus on, at least not for the moment, based on the facts that we know. But there is an excess value going over to the bankruptcy-remote entities.

And on that value, for that value, Your Honor, what they say in their papers is that what they're getting is this stock that, as Your Honor has quite properly analyzed, essentially, is stock that does not give you the normal rights that you would have against an entity. Essentially --

THE COURT: But they're getting -- I think they say, We're getting that stock, but we're also getting the benefits that this structure gives us in terms of our own dealings with substitute lenders for our current lenders with whom we've got problems. So we're about to go into default with our current lenders. If we do this transaction, we may get something back that's a little less than what we had before, but we'll be enabled to make a new loan that gives us all kinds of upside potential.

Maybe they're right, maybe they're wrong, but for a fraudulent conveyance, we don't usually slice it too finely.

MR. AGUSTI: Your Honor, I mean, I would love an opportunity to have a preliminary injunction hearing at which we can address these issues in greater length; first of all, let me say that.

Second of all, Your Honor, let me say this about what you just said: Certainly, there is money that's being generated by this transaction to pay off secured lenders. And there's no showing that this is the only such transaction that could be entered into to pay off those secured lenders.

But there is an excess of value over and above what's being -- which is not very fine. It's hundreds of millions of dollars, Your Honor. And it's going over to these new bankruptcy-remote entities; and these new bankruptcy-remote entities are only paying back this stock for it.

And so, Your Honor, you do have to, in looking at the reasonably equivalent value, you have to look at the reasonably equivalent value for what? Basically, they are receiving a payment on the secured loans for the transfer from the new lenders. But, basically, that's not -- that is not reasonably equivalent. And I think that anyone, looking at their

papers, would have to conclude that. Because they're getting a loan that's in excess of the loan necessary to pay their current secured lenders.

And so, basically, Your Honor, to the extent that there is additional assets, assets over and above what it took to pay their current secured lenders, Your Honor, that excess -- the only thing that they're getting, and they say time and again, their rationale for why there is reasonably equivalent value, is just because they're getting the stock, which, as Your Honor has analyzed, is actually not -- it's this stock in this restricted affiliate that can sort of go on its own.

So to creditors like -- perhaps to them, in ten years, that might be of some value. But to a creditor like us, somebody who is a hostile third party, that stock potentially never will have any value because, essentially, the bankruptcy-remote subsidiaries can simply thumb their nose at their technical owner.

THE COURT: I appreciate that; and I know that we've got a limited amount of time, so -- but, you know, you're in the position of a creditor. You can't make the kinds of arguments of fiduciary

duties and all those kinds of things which might get into interesting issues of the sort that you were talking about that creditors, as your client, would look at, Well, what are their rights under the contract?

And, unfortunately, it sounds like you don't have all that strong a contract in the sense that you don't have the kinds of things that people, according to the defendants, anyway, who engage in these kinds of transactions routinely get for themselves.

And one possibility is to think, Oh, maybe nobody remembered to think about it. Another way is that it's sophisticated parties on both sides; presumably, it was negotiated; and they got whatever they could get. And your guys got something that protects you at the level of DHI, but it doesn't protect you against things that the subsidiaries do, other kinds of transactions, other kinds of refinancing.

So give me your argument on that.

MR. AGUSTI: If I may, Your Honor, first of all, Your Honor, this is a factual issue. This is totally a factual issue.

I just want to make this point again: They note in their papers, which they had the weekend to write, they note 37 provisions that might have avoided this. In our three hours that we had to put together our paper, we point to one provision that they could have put in the document that would have avoided this dispute.

And that is for them to say in the document that notwithstanding the foregoing, notwithstanding the foregoing, this anti-transfer provision shall not limit the ability of indirect subsidiaries of DHI to transfer assets. Your Honor, very simple. Why didn't they write that down?

Your Honor, what they're asking you to do is to read an anti-transfer provision in such a way so that it means nothing. You can't read -- New York law tells us -- heck, the law in virtually every state tells us that you can't read all of the meaning out of a contract lightly.

So if it was their intent at the time that they entered into that contract to read all the meaning out of the anti-transfer provision, it was incumbent upon them, not us, to write that expressly in the contract.

All of those provisions to which they referred, if they had suggested any of those 17 provisions to which they referred, maybe it would have raised this issue that they wanted a restriction on the ability of indirect subsidiaries; but, simply, they simply did not.

In the absence of an express provision -- in their absence, because we're actually asking you to interpret the contract in a way that makes sense. We're saying, Hey, we've got a guaranty. We've already had control of the two assets in which we invested. The only possible purpose of this guaranty would be to control other assets. And so the anti-transfer -- according to them, they knew we all held all our assets indirectly.

So there's no way -- given the opportunity to show this at a preliminary injunction, Your Honor, there is no way that PSEG would have agreed to a guaranty with an anti-transfer provision that allowed DHI to transfer away all of their assets on the day after signing the guaranty. There is just simply -- it simply is not plausible.

So if they want --

THE COURT: You have probably 6

minutes.

MR. AGUSTI: Yes, sir.

THE COURT: 6 minutes.

MR. AGUSTI: You would like me to finish in 6 minutes?

THE COURT: Right.

MR. AGUSTI: Yes, sir.

Well, Your Honor --

THE COURT: Let me -- just so you know, I'm thinking that given the way this turned out where the transaction was announced on July 11th and this case didn't get filed until July 22nd, and the emergency date is this Friday, July 29th, I'm not going to treat this as a TRO in the sense of our usual "all you need to show is a colorable claim on the merits."

I think this is not the typical TRO situation where you don't know anything about the facts and things of that nature.

I'll treat it as a TRO in terms of the decision point is, Do we need a put a stay of some sort in place, a status quo order in place, so that we can have a prompt preliminary injunction hearing? But I will require your side to show that it's likely to

succeed on the merits. And that's the way I'll write it.

I'll justify the reason I'm doing that is because you took your time getting here. And it might have been a good idea, it might have been a bad idea as to the way you did it. I don't see it as laches, but I'm not going to give you the benefit of the doubt.

The other thing is I do want your point of view as to what would the bond be if I entered a temporary restraining order.

MR. AGUSTI: Your Honor, I'll answer the last question first.

Your Honor, our view is -- and I just want to go back to this point, if I may, on the harm. Right now, Your Honor, we do not have even a statement that they're going to lose financing if the TRO is entered for the limited period of time that it takes to consider a preliminary injunction.

So even if you are treating this for purposes of proof as a preliminary injunction, it will still be of limited duration.

And so, Your Honor, since they have not --

THE COURT: How much time do you think you would need to put on a preliminary injunction?

MR. AGUSTI: Your Honor, we will do it as quickly as you think we have to do it. We want an opportunity -- Your Honor, we've had three hours to respond to their opposition. We would like an opportunity to have a proper hearing. So as fast as you think you need for it to be done, we'll have it done that fast.

THE COURT: So it could be a matter of weeks.

MR. AGUSTI: We could do it in ten days. We can do it easily in ten days.

So, Your Honor, if Your Honor has hesitations about that, we will do it as fast as you need it to be done. We would like for you to have the benefit of our full thoughts on what's been done here.

And I might say, Your Honor -- and I accept what you said -- I will say that we filed our action, what we thought was our TRO request, what we thought was eight days before the scheduled closing date. There's been no representations that pricing has happened. I didn't see that in any of the papers. So I don't know that they're prepared to close on

July 29th.

There is really almost no proof that they are actually going to suffer irreparable harm. There are general statements, extremely general statements, about what harm might come to them. There is no specific proof as to harm, Your Honor. And I'm only asking for a very short period of time.

So, Your Honor, on the merits, we believe that the anti-transfer provision is violated here. And we think their interpretation of the anti-transfer provision is implausible.

And we would point to the cases that we noted in our brief about both the quantitative and qualitative. There can be no question that this is a qualitatively very important transfer. And there is no question that it's quantitatively a very important transfer. It's a transfer of billions of dollars in assets.

And so we think, Your Honor, that under any interpretation of these anti-transfer provisions, that they would be violated.

Going to the fraudulent conveyance, Your Honor, let me just very quickly blow through insolvency. There's no dispute, really, about

insolvency. Once this transfer occurs, DHI will be insolvent.

As Vice Chancellor Lamb laid out in the Mitsubishi versus Babcock case, the fact that they have got affiliates that have the capacity to send money to them does not save them from insolvency. That's a holding of this Court. And so it's clear that when this transfer -- and it's in our papers. It's clear --

THE COURT: Before the transfer, all these properties were owned indirectly by DHI; and after, they're going to be owned indirectly by DHI.

MR. AGUSTI: Yes, sir. But the difference, of course, is that before, those properties were -- DHI had the power to call up cash flows from those properties. In fact, we feel that they must have been doing it up to now or else they wouldn't have been able to service --

THE COURT: Didn't you just tell me a second ago that it doesn't matter if they could do that for purposes of insolvency?

MR. AGUSTI: It doesn't matter for purposes of insolvency if an affiliate has the right to this entity or not. If they still had the

100 percent control of the subsidiary, Your Honor, so that it could actually command that those affiliates send money up to them, then, no, they would not be insolvent, Your Honor.

THE COURT: So the way you're looking at it, let's say in November, they've got these large bills coming due, 78 million for one of the plants and another number for the other --

MR. AGUSTI: Right.

THE COURT: -- they could have gotten that money under the old structure from any one of a number, perhaps, of their subsidiaries.

MR. AGUSTI: Yes.

THE COURT: But with this new setup, they're going to have no -- they have no control of whether they get any money from anybody except the two failing plants.

MR. AGUSTI: Exactly, Your Honor. It would be like a parent, for example. A subsidiary that's insolvent can't save itself by its parent having a lot of assets because the parent has no obligation and the subsidiary has no power to cause the parent to bring assets down to it.

We're in a similar situation here.

The parent in this case, because of the bankruptcy-remote scheme, has no power to pull the assets up. And so, therefore, it's going to find itself in a situation where it is cash-flow insolvent.

But for whatever -- you know, charity, the affiliate which has no obligation to do it might give it. And so that, Your Honor, is not sufficient. It's insolvent. And so, basically, that factor is clearly satisfied.

The other factor, Your Honor, which we discussed a second ago about reasonably equivalent value, this same stock which is to be evaluated for the purposes of reasonably equivalent value in our hands, in our hands, this stock, which is what they're receiving for the excess value, if you will, of the transfer, is worthless to us. And so there is no reasonably equivalent value that's being transferred to our clients for it. And, therefore, we believe that, on the facts, we have a fairly straightforward fraudulent transfer.

The other factor doesn't require even those showings. Even if you have reasonably equivalent value, Your Honor, there is a second way of getting a fraudulent transfer. And that way is if you

have a transaction whose purpose it is -- one of whose purposes it is to hinder creditors.

We're being plainly hindered by this transaction, plainly, under the analysis that Your Honor made. Whether or not they receive reasonably equivalent value, this transaction will hinder us. And so if it -- indeed, it is structured to hinder us. It is structured to put us outside of a ring-fence. And that ring-fence, we think, and they must think as well, is --

THE COURT: Okay. And just remind me. I saw mention of a $225 million cap, maybe an annual cap in distributions, and a $270 million amount that was coming due.

MR. AGUSTI: Yes, sir.

THE COURT: Is the 270 million what would be owed to your company, you, or to all creditors?

MR. AGUSTI: No. To all creditors, Your Honor. So, basically, even if they decided to go ahead, assuming that version of the facts, if they decided to go ahead and contribute up to the 225 million, clearly, they wouldn't have enough.

THE COURT: All creditors would have

to take a haircut.

MR. AGUSTI: That's right. So, basically, they would be clearly insolvent then.

So, Your Honor, we think we have, either under theory number one, which requires no reasonably equivalent value and insolvency; or, reason number two, which is basically a construct to obstruct and hinder creditors, that we satisfy the Delaware Fraudulent Transfer Act statute.

THE COURT: Why don't we hear from the other side.

MR. AGUSTI: Yes, Your Honor.

MR. KURTZ: Good afternoon, Your Honor. I'd like to start with what we stressed in our papers, which, namely, is that the plaintiffs' entire case, including this motion, is based on a misunderstanding or a misstatement of the underlying facts, agreements, and transactions.

And we heard a lot about not losing the forest for the trees. So what I'd like to do is start off with two very important points which pervade the entire analysis and answer, really, all of the questions and address the reasons, fundamentally, why there is no technical claim here and, perhaps less

importantly but certainly notably, that there is absolutely no economic prejudice or harm to them, notwithstanding this notion that there is some scheme out here.

And the first faulty premise is their position in the papers that DHI owns power plant assets and is going to effectively transfer those assets and leave behind the unprofitable Danskammer and Roseton. And of course, that's not true. As we've put in with evidence, there is no direct holdings whatsoever; nor is there going to be a separation under DHI of either of those facilities.

DHI today, indirectly, through a series of subsidiaries, owns 17 power plants, many of which are profitable. And following the reorganization, DHI will own 17 power plants, the very same power plants; and they will be equal in value to what they're equal to today except to the extent that the value is enhanced by reason of its new liquidity and its new structure.

So it's important to understand that not only is there technically not a transfer but, economically, DHI has the same value after the reorganization that it has today. It is still the

indirect owner of all the assets.

So we have an interesting case, and I'll walk through it. The plaintiffs could not establish a technical breach of the successor obligor or the "all or substantially all" provision. But what's interesting about it is usually, when you get in these situations, it's because the guarantor is being left with substantially fewer assets than they had; and that's actually not the case here.

There was a notion that it must be a change because why are we resisting? But as I'm going to get into, we're resisting because it's the plaintiffs that are trying to effect the change. It's the plaintiffs that are trying to substitute the guarantor as being DHI with a guarantor of DHI plus a bunch of subsidiaries that are not guarantors today; that haven't pledged any assets; that there's no security interest in; and otherwise.

The second basic faulty premise here is this notion that this bankruptcy-remote structure somehow shields value from creditors. And that, likewise, Your Honor, is simply not true. As I've just mentioned, all of the same assets are within DHI's indirect ownership.

The way this will work is you will have bankruptcy-remote subsidiaries that will directly or indirectly own the power plants. What that accomplishes is permitting those profitable subsidiaries to continue to operate outside bankruptcy even if DHI or another troubled affiliate is forced to file.

It does not mean, of course, that the value of those bankruptcy-remote entities is removed from the bankruptcy estate. To the contrary, the estate, if it was DHI, would continue to own what it always owned, which is equity in entities that were holding companies that ultimately owned the power assets; and they would still have that.

And the way one would liquidate that claim, of course, is that you would have a default by a borrower, then a default by the guarantor, then a lawsuit against the guarantor, then a judgment, and then execution. And the execution would be against the equity.

And that equity would not, of course, permit you to reach down and through corporate entities and raid their bank accounts; but it would permit you to effectively satisfy your judgment

because you would be able to sell the stock, which includes, of course, the value of the assets.

So at the outset, there is not even harm here. There is just an interest in I guess creating better paper and better security that doesn't exist today.

And with that, what I'd like to do is move through the technical elements, of course, starting with the likelihood of success on the merits because this is so clear that I think it really sheds light on the rest of what we're going to do today.

And the first point, and this is dispositive, is what I'll call the ASA -- "all or substantially all" provision; it could be called the successor obliquer clause as well -- applies only to DHI and not any subsidiaries.

Notably, there are standard ASA provisions that are all set forth in the model indenture which everybody uses to draft indentures, and which they've been recognized by the Courts in numerous decisions. And they provide for two forms. One form is where you lock up just the guaranty, DHI; and in the other form, you include the subsidiaries as well.

The parties here agreed only to the form that applied to DHI and not to the subsidiaries. Interestingly enough, that's not the more common form. So what the parties were able to negotiate here for was the more restrictive form. And that's how --

THE COURT: Now, I don't have anything in the record. Maybe I do. I've read the briefs. I haven't read all the affidavits and everything. So I don't know if there is anything in the record that indicates that that was an explicitly negotiated-for provision.

MR. KURTZ: Your Honor, we certainly did not go back and include the drafting history. And the reason we didn't do that is because the provision is unambiguous on its face; and so, of course, extrinsic evidence is inadmissible.

What we did include in the record were other forms of indentures that included the language, including the model form of indenture --

THE COURT: I've seen those.

MR. KURTZ: -- which includes the expansion to the subsidiaries.

THE COURT: All right.

MR. KURTZ: And I would note, just

because there is another rule of construction which is relevant here, and that is when parties deliberately include a subsidiary in one provision and not in another, they are, of course, deemed to have done that deliberately.

And Section 4.3 of the very same guaranty, which is the very next section after the ASA provision, which is 4.2, specifically includes not only the guarantor but also the guarantor's subsidiary. So the parties, when they intended to include within a restriction both the guarantor and a particular subsidiary, have, in fact, done so.

Now, the only response that we have gotten to any of this, Your Honor, and it was stated a couple of times today, was, That sounds like a bad deal. Now, put aside, as I'm going to get to, because there is actually no diminution in the value of DHI and no transfer away of any DHI asset -- it's not even true -- but, of course, that's just not how the law works. Making a bad deal doesn't make it an ambiguous deal or subject to reformation.

And even though I wouldn't normally feel like I needed to cite a case for that proposition, I thought it was interesting that Vice

Chancellor Noble in the Great-West case just this year on January 14th addressed this precise argument with almost the precise terms. You'll note that the plaintiffs in theirs papers called it an absurd construction because they didn't get enough.

And with Your Honor's permission, I'll read a brief passage:

"Great-West also attempts to encourage a conclusion that the language of the default Expense Assumption escalator is ambiguous by insisting that the Defendants' interpretation produces an unconscionable and absurd result. That Great-West does not like the result, however, does not render it ambiguous if the result is required by the plain language of the contract."

And it goes on to say that lawyers and parties have to give meaning to the words that they've selected.

So, initially, Your Honor, we know there is more than one version of this.

THE COURT: Let me -- they seem to be making the argument that -- I guess it's one of the principles of contract construction that if there are two ways to interpret the contract and one way leads

to an absurd result -- which, normally, it doesn't, but our Supreme Court once in a while has found that -- then you don't go in the direction of the absurd result.

They seem to be saying that, you know, for them to insist on DHI being a guarantor, and without having in mind that that was going to include the hard assets and not just ownership in this stock, would be considered absurd.

But it sounds like what you're saying is that there are these two different forms so that even if it's a minority form, it's a recognized position that some people come to.

MR. KURTZ: It is, Your Honor. And nor is it absurd. There is nothing absurd about -- some people loan, as did plaintiffs, on an unsecured basis. Some get a secured basis. You can't come in and say, Why would I have done that? They can get rid of all their assets and I won't have anything. Well, because you did do that.

Some people get transfer restrictions on guarantors at the issuer itself and some get them with respect to their affiliates as well. It doesn't make it absurd. It just makes it a commercial

transaction.

Separately, what I find interesting is it doesn't happen to have any effect. I'm not quite sure why it would be absurd to say, You are left with your remedies against DHI which, following the reorganization, will hold each and every asset that it held before the reorganization. You'll just be moving bubbles around in the corporate organizational chart.

And you will include bankruptcy-remote protections which do not devalue the stock which is subject to execution. It would, in fact, enhance the value of the stock.

Again, this is really a critical implication that's wrong by them. It's the idea that if you make yourself bankruptcy-remote, that you pull the assets out of the structure and it's not available, the value of the assets are no longer available to DHI. That's not true.

THE COURT: Do I have any evidence in the record at this point -- I realize we're one day into the case -- that I could rely on for that? Are there any affidavits to that effect?

MR. KURTZ: Yes. We have put in an affidavit that says all of this, Your Honor, that says

that we will -- that DHI indirectly owns through a series of subsidiaries all of the power plants at issue; and following the reorganization, DHI will continue to own through a series of subsidiaries the very same power plants.

THE COURT: I'm with you on those two, but I think you went a little further. And I thought I heard you say that there is no devaluation of stock when that stock happens to be in a bankruptcy-remote entity. In fact, it might actually have higher value. Is there any evidence of that?

MR. KURTZ: I'm not sure that we put it in evidence, but let me explain it this way. It's not sort of magic capsule that you jump into. All it really is is certain restrictions which lenders require in order to provide better terms and a loan, in this case, that imposes into the structure an independent director.

Frankly, here in Delaware, in Chancery Court, I'm not sure I ever heard anybody complain about the following of corporate governance at the subsidiary level and the concern with the use of an independent director to ensure that the companies operate the way they operate.

But under normal Delaware law, the holding company owns the shares of its direct subsidiaries and right down the line. That doesn't change because there is an independent director in the corporate governance.

And then in terms of why is it worth more, because you can't be pulled into bankruptcy. Then you operate outside the bankruptcy, and you've entered the bankruptcy filing, which means your decisions aren't subject to review and billing by courtrooms full of professionals and judicial oversight.

THE COURT: All right. I understand.

MR. KURTZ: So that's why you never really get past their claim, at least under Section 4.2, because DHI isn't making the transfers.

Now, just for the sake of completeness, they've moved on and talked about, Well, let's just assume that somehow it applies to everyone.

And by the way, I pause on the notion that a loan agreement is supposed to contain provisions that don't restrict the borrower but, rather, delineate all the things the borrower can do. That is a novel position that has never been stated in

court, literature, or even in casual conversation that I've ever heard about.

The way covenants work is they're restrictions on the borrower. And there is no provision within the credit agreements that say -- or the indentures, that say that DHI can continue to sell power or DHI can get a loan, in fact, if they're permitted to get a loan; that DHI can hire and fire people. I mean, you don't set forth in a borrowing all the different things that an entity can do.

What you do is you negotiate restrictions. And this restriction was specific to DHI and not the subsidiaries. You don't need the suspenders on the belt. You already have the prohibition only on DHI. You can't extend it to the alternative form by saying, Yeah, but you didn't say, "By the way, when I said DHI, that means DHI and not anyone else." That goes without saying.

THE COURT: Let me just -- and I apologize to the staff in the sense that it's a bit of an imposition that we're beyond 5:00 this evening.

Ms. White, you're free to go if you have buses to catch or other transportation. Thanks.

But that's fine. But otherwise, what

I would like us to point to is maybe wrapping up in the 5:30 range, something like that.

MR. KURTZ: Understood, Your Honor.

THE COURT: Go ahead. I'm sorry.

MR. KURTZ: On sort of the purpose and the idea that even if this was somehow to extend -- and it cannot -- to the entire enterprise, the enterprise isn't transferring anything away. The enterprise is going to have the same assets and the same power plants that it had before.

And the decision that I think is most instructive is Tyco. And in Tyco, the issuer had four lines of business. And what they proposed to do in their internal restructuring was to spin off two of those lines of business. And the Court went through an analysis, and I think it's actually worth quoting the Court on this.

"The Transaction clearly resulted from a decision to sell off some properties made in the regular course of business. The only liquidation involved in the Transaction was that of TIGSA, a holding company with minimal assets other than Tyco's operating businesses" -- sounds familiar -- "and TIGSA was replaced by TIFSA" -- so there was a change in the

holding company -- "also a holding company with minimal assets other than Tyco's operating businesses."

"BNY" -- who was the party challenging the indenture trustee in that case -- "argues that Sharon Steel" -- which is the Second Circuit decision everybody looks at -- "applies because of the liquidation of TIGSA," the holding company. Which we're not getting a liquidation.

"But the operative entity with respect to the Notes is Tyco" -- here DHI -- "not TIGSA. TIGSA was simply a holding company, and it has been replaced by another holding company."

"While UV's noteholders" -- and there, it's the plaintiffs in the Sharon Steel case -- "found themselves expecting repayment from an entirely new entity, here the noteholders still look to Tyco for repayment."

That's on all fours except in one respect. In Tyco, two important businesses were, in fact, spun off. In this case, none of the power plants are being spun off. The enterprise under DHI will look the same after the reorganization, just as it looks today.

The other case, Your Honor, that I think is worth reviewing is the Hollinger case, Vice Chancellor Strine's case, where, in discussing these issues, he talked about the fact that you would need to have effectively a blow to the heart, to a vital organ, leaving the business disabled, before it would be an "all or substantially all."

And here, of course, the business is going to be improved. It's not going to get a blow to the heart. If anything, it's going to get a shot of adrenaline to the heart.

And what Hollinger then goes on to say, and as everybody, I think, really understands, is that ASA provisions, successor obligor provisions, are not there to prevent corporate internal reorganizations. They're there to insure that all the assets aren't basically sold off to a third party without having any guaranty on them.

And that's really the problem that you have here, Your Honor, which is that the plaintiffs are in the same position, albeit somewhat enhanced, perhaps, but what they'd like to do is change their position entirely. They'd like to have new covenants, ones that they feel maybe they should have had to

begin with.

And we identified probably not 37 or 17, as counsel said, but we identified standard garden-variety customary types of covenants that are used to protect against, you know, the erosion of assets and the like that were not included here.

And I think there is one that is of particular import; and that is the provision -- and it's in the model indenture, and we've cited cases on it as well on Page 26 of our brief -- but the provision that limits the ability of the borrower to restrict the payment of dividends from a subsidiary.

And that is -- when you get past this, what they keep focusing on, Well, what about the dividends from the subsidiaries? Those were effectively unrestricted before. Now they're being restricted. So they didn't get one of those and they can't get them now. That's got nothing to do with the transfer of assets, the provision at issue. That's a different kind of clause.

But just to give the Court the comfort that you might want on it because, unlike some cases where you have to make tough decisions on the basis of a technical reading, here, actually, the equitable

decision follows the technical reading.

And the issue here is what is the reorganization doing, if anything, to change the plaintiffs' standing? And it's doing nothing. Because as a matter of corporate law, first, as a matter of corporate law, it's a subsidiary's decision, not DHI's decision, as to when to dividend a payment or distribute a payment up to the parent. That's not something DHI controls. And that's corporate law. People come here to Delaware and incorporate to insure that that is the law.

Secondly, Your Honor, this restriction on subsidiaries in the bankruptcy-remote entities, this is not in an LLC agreement. This is not corporate governance. This is something that's contained in a credit agreement. And that credit agreement is with respect to senior secured debt. And so the senior secured lenders are entitled to be repaid before the unsecured lenders in any case. And once they are repaid, then all these restrictions go away. So once the credit agreement goes away, the restrictions go away.

So even though this could easily be built into the LLC agreement, it's not. So it's not a

corporate governance issue. It's a loan. And there is no restriction whatsoever on the incurrence of senior secured debt in any amounts that DHI chooses to incur.

Even if DHI could cause the subsidiaries to otherwise pay a dividend, which is sort of the notion here, it's certainly under no obligation to do so. Plaintiffs have no right to cause the parent, to cause the subsidiary, to dividend. So they're not losing any right because there is a restriction in a credit agreement. That's not a right that exists for them today.

As a matter of law, a subsidiary is not required to make dividends in order to pay a judgment against a parent, which is obviously what the plaintiffs are trying to do here.

So in the normal case, no reorganization, a judgment against DHI, DHI has no obligation to dividend up money to pay the judgment; and the law is that the subsidiary is not required to do so. So, again, no change based on the reorganization in their ability to collect on their debt.

In any case, plaintiffs' argument that

the independent manager has some veto right on declaring dividends is wrong. And the only support that the plaintiffs cite for this is a statement that I made last Friday on two hours' notice before being dragged into an order to show cause in New York Supreme Court on the same subject which has now been stayed. I made the statement. I was wrong.

In order to insure that this is clear, Your Honor, if you simply look at the governing document, it says, "for the avoidance of all doubt, there is no veto right."

So you go through all of this, and there is no change whatsoever. There is no right to the dividend. There is no bar to the dividend based on the bankruptcy-remote structure. There is no harm.

And that brings me, Your Honor, and I'll try to move a little faster on this stuff, to the fraudulent transfer case. There seems to be some allegation that we weren't disputing this. That's, of course, wrong. There is no transfer. There is no transfer by DHI, so DHI could not have committed a fraudulent transfer.

If a subsidiary of DHI makes a fraudulent transfer, then that subsidiary is subject

to a lawsuit. You don't sue a parent company based on the conduct of a subsidiary. So to start with, you have the wrong party. They're not entitled to prevent transfers. They don't have standing on transfers with respect to subsidiaries.

As to the parent, as I've already said, the parent now owns the indirect interest in all these power assets through subsidiaries, and it continues to do so. So the fair value, it's starting the day with the same value it's ending the day. Before the reorganization, it has the full enterprise value of all of its subsidiaries. At the end of the day, it has the full value of all of its subsidiaries. It goes from the left pocket to the right pocket. You can go find it on an org chart, but that doesn't mean it's a transfer.

And then the last point on the transfer, there was a lot of argument about the poor position that the plaintiffs will find themselves in following the reorganization because of the poor performance of the direct borrower's assets as opposed to those under DHI. And I want to clear the record up on this because, of course, it doesn't make a difference. It could be the case that DHI is unable

to pay a penny under the guaranty, but if it's not a transfer of all or substantially all of the assets or a fraudulent transfer, it's not before the Court.

But, again, in the interest of at least making sure the Court is aware of the actual facts as opposed to the allegations, there is an unrestricted -- there is an ability to provide dividends unrestricted in use up to DHI in the amount of $225 million per year. So no change with respect to that 225.

There is, in addition to that, on the closing of the refinancing, a transfer of $400 million to a DHI direct subsidiary outside the bankruptcy-remote entity subject to the same non-restriction on use as the 225. So to the extent DHI has the ability to access dividends from beneath it, it will still have that ability with respect to 400 million.

In addition to that, there is a direct or an indirect subsidiary of DHI that has the right to sell 20 percent of GasCo. GasCo is valued at approximately no less than 2-1/2 billion dollars. 20 percent of 2-1/2 billion dollars is $500 million. That's not within the bankruptcy-remote entity and

there is no restriction on that use.

You add those numbers up over the four years before the maturity on the indentures at issue, the first maturity date, and you come up with $1.8 billion of assets that are available to the extent their dividended up without concerning ourselves with bankruptcy-remote structures; and that's as against a $1 billion obligation to the plaintiffs.

So we're not even talking about a situation where there is insufficient assets of DHI, necessarily, in order to pay all the debts as they come due.

Irreparable harm, obviously, that's usually the price of entry. They've not established any. What they're trying to do is cut a new deal. But let's talk about the balancing of the equities because the statement was made, We should just have a temporary restraining order but wait ten days, have a preliminary injunction. They haven't satisfied the standards, and there is going to be enormous problems.

The capital markets in this country have been up and down for years. There are prognostications -- excuse me -- people have predicted

that there may be a double-dip recession. Our country may go into default early next week. Greece, Italy and Ireland have gone into default.

When financing is available in the marketplace, you need to take it. DHI is in a difficult position. It has very little access to capital, which it needs at this juncture. And it has already publicly announced that it is at risk of tripping a covenant default in Q3 or Q4 of this year, which will bar all drawings under its existing facility.

In addition to that, that will cross-default across the enterprise, including a $3 billion indenture. The company will be at material risk of having to file for bankruptcy, which is going to damage all of its shareholders, all of its subsidiaries, and all of its stakeholders, including the plaintiffs.

And the cavalier notion that if they get to nose around long enough, perhaps they'll find something to support a TRO, is, frankly, misguided. A lot is riding on this.

A decision by the Chancery Court in Delaware that there is a likelihood of success on the

merits will reverberate through the capital markets. I can all but guarantee we will not be able to close the financing, and certainly not on the terms that have been negotiated.

And when you have to move your interest rates, as you might have to do if you're not bankruptcy-remote, by 4 points on a $1.7 billion facility, you're talking about real dollars, even if the financing remains available.

So a lot is riding on this. This is not an opportunity for somebody to try to improve their covenants. It is not a free look and a free discovery ride until we can get ourselves into a preliminary injunction hearing. We have the record.

Your Honor has recognized that by reason of the timing here, you're going to apply the preliminary injunction standards anyway. Frankly, I think it would apply because you have the guaranty in front of you, the transaction as has been announced in front of you, so I think you have the facts anyway.

And there is no free look-see through discovery without a material damage to all the stakeholders. We cannot walk out of here with a TRO and have any expectation of being able to close the

refinancing.

So the balancing of the equities weighs overwhelmingly in our favor. I can't think of a way to protect against that with a bond for sure because bankruptcy includes a lot of qualitative matters that are far outside dollars and cents. I can tell you it involves a lot of dollars and cents. But, today, we think we will have financing available for closing shortly of 1.7 billion; and I suppose a bond at 1.7 billion will provide replacement financing if we can't close.

THE COURT: All right.

MR. KURTZ: Thank you, Your Honor.

MR. AGUSTI: Your Honor, I recognize staff has to leave and I will make my points very briefly.

Your Honor, I would implore you to consider this as a TRO application. Your Honor, we filed our papers three business days, really, after we were told that our asset -- that our guaranty would not be assumed. That was not until late July 15th, a Friday. Your Honor, we have done everything we can in an extremely complicated case to try to put the case together before you as soon as possible.

And, Your Honor, this oral argument today emphasizes why it's going to be important to try to give the parties a very limited amount of time to do work they need to do to get the evidence before you. We've heard a tremendous amount of testimony by counsel as to what the parties intended at the time. We are trying to decipher from looking at model books what the parties intended at the time.

Your Honor, we believe that it is absurd, if you will, to enter into a guaranty, as a logical matter, to enter into a guaranty knowing, as they say that we knew, that all the assets were held indirectly, that we intended for that guaranty not to restrict the ability of the indirect subsidiaries to transfer the assets.

That is, under any -- he's saying that -- don't worry about it. In this case, there is no real transfer. Of course, we've discussed ad nauseam that there really is a change in the person who holds these assets and, therefore, a change in what that stock means to us.

But under their interpretation of this provision, Your Honor, they don't have to just transfer it to somebody in their corporate family.

They can transfer it to anybody, anywhere. Because, Your Honor, it's only indirect because they say that this doesn't apply at all to assets held by indirect subsidiaries.

And so, Your Honor, before you reach the decision that they have a substantial likelihood of success on the merits on that kind of an interpretation, I implore you that we actually get some evidence in front of you as to what the parties actually negotiated in reaching this transaction.

Your Honor, counsel has indicated that they faced some difficulties in the third quarter and fourth quarter and that they may have defaults under their credit facilities, but, Your Honor, not in the next ten days.

Your Honor, in the next ten days, which is all that we require -- we can even do it in less if Your Honor thinks -- required for us to put together the papers necessary for the preliminary injunction hearing, all we're hearing is that Portugal might default on its debt, that United States might default on its debt, and that repercussions of this are going to somehow affect them. Your Honor, that is not the kind of proof that has ever been found

sufficient to be irreparable harm.

Certainly, if you're balancing the equities and you consider what I think is a somewhat fanciful concept of what could possibly happen to their financing in the next ten days as opposed to our certain, our certain losing of our contract rights on a $790 million guaranty, Your Honor, it strikes me that, at least for the limited period of time that it takes for us to advance the papers in a preliminary injunction, that you should give us the opportunity to do so.

Your Honor, I would just make just a couple of other points because I know that time is very short. One thing about bankruptcy-remoteness that has kind of been misunderstood or perhaps misstated, I think, the fact that you are the subsidiary of a company going into bankruptcy does not mean that you have to go into bankruptcy.

They pretend that if you don't have a bankruptcy-remote structure, necessarily, all of their subsidiaries, if DHI files for bankruptcy, would have to file for bankruptcy as well. That's not true.

To give you a colorful example of how that works, many airlines have filed for bankruptcies.

None of their frequent flyer programs have filed for bankruptcy, which are subsidiaries of those entities. The reason for that is because those programs are profitable, and they didn't want to impose the cost of bankruptcy upon those subsidiaries.

So the issue is that that's not what bankruptcy-remoteness is about. It's that if you put basically an independent board, and if DHI loses the power to direct what goes on down below, then there is no way that you can control that asset, control that company. That's why it's bankruptcy-remote. It's because the bankrupt can't get at it even if it wants to.

But if the proper thing to do is for the companies -- for subsidiaries that are profitable not to go into bankruptcy, they won't go into bankruptcy. And certainly, we have no desire that anybody go into bankruptcy.

So, Your Honor, what I would ask is that you give us the opportunity to be able to supplement the record and an opportunity to conduct some level of discovery, Your Honor, so we can see these negotiating histories that they're talking about, so we can present ours, so that Your Honor can

decide for yourself whether the testimony that has been given by counsel is true or whether there are other facts that are true.

Because, Your Honor, let me give some testimony, as long as we're doing that. It is actually very normal -- I disagree with counsel. Counsel says that covenants go only in favor of the lender. It's actually very normal for a borrower who wants to make clear that covenants do not reach into certain areas, it's extremely normal for that borrower to make that clear through an express proviso to the covenant. And that's what we're saying is missing here.

They're claiming that, essentially, we knew that all of their assets were being held in indirect subsidiaries; that, essentially, we were entering into an anti-transfer provision that allowed them to, through their control of the indirect subsidiaries, to move those assets anywhere they wanted to; but that they didn't feel a need to put that in a proviso in the documents.

We believe when Your Honor receives evidence on these issues, that Your Honor will be able to conclude what the answer is and not try to have to

extrapolate it from an insufficient record.

So, Your Honor, thank you very much for hearing us on such short notice. And if the Court has no further questions, I will stop.

THE COURT: I appreciate very much the efforts of counsel on both sides.

This is -- do you have something also you want to say?

MR. KURTZ: Your Honor, can I at least make one point? Because the idea that there would be no bankruptcy and the like for the subsidiaries at this point, there is cross-default provisions; so if DHI files, everyone files. There is a cross-default. So factually, you should be aware of that.

I think, Your Honor, I had answers, but I know you want to complete; but I at least wanted to make sure that you were aware of that.

THE COURT: All right. Thank you.

It's complicated enough that I'll take the matter under advisement. I do have in mind that Friday is a deadline, at least a possible deadline, and so I plan to make a decision before then. But I do have a very full week between now and then, also. So exactly the form and when, I'm not positive, but

sometime between now and Friday, I'll get back to you.

All right. Thank you.

(Court adjourned at 5:26 p.m.)

CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 67 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 25th day of July, 2011.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

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